

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090644
	:	TRIAL NO. B-0602216
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
JAMES ORR, a.k.a. CHARLES ORR,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, James Orr, a.k.a. Charles Orr, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of robbery, aggravated robbery, and four counts of kidnapping, with firearm specifications. He was convicted after a bench trial.

One afternoon, a man later identified as Orr approached April Gill while she was using an automated-teller machine outside a grocery store. Orr and his accomplice, Anthony Hayes, then got into Gill's car and demanded money. Hayes threatened to kill her if she did not comply, and he showed her the butt of a handgun. Orr and Hayes made off with Gill's purse, her car keys, and more than \$1000.

Approximately two weeks later, Orr approached Candace Pugh in the parking lot of a restaurant. After a brief conversation, he and Hayes got into Pugh's car with

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

her and her three children. Hayes patted his jacket to indicate that he was carrying a gun. The men then ordered Pugh to drive to her bank and withdraw money.

When they arrived at the bank, Hayes accompanied Pugh into the bank with Pugh's youngest child. Orr remained in the car with the other children. Pugh withdrew \$1000 and gave it to Hayes. Orr and Hayes then ordered her to return to the restaurant and drop them off. They told Pugh that they knew where she lived and that she was to drive directly to her home.

The trial court found Orr guilty of the offenses and sentenced him to an aggregate prison term of 32 years.

In his first three assignments of error, Orr now argues that the convictions were based on insufficient evidence and were against the manifest weight of the evidence. We address the assignments together.

In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."² To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.³

The aggravated-robbery statute, R.C. 2911.01(A)(1), states that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it,

² *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

³ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

indicate that the offender possesses it, or use it.” R.C. 2905.01(A)(2), the kidnapping statute, provides that “[n]o person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter.” R.C. 2911.02(A)(2), governing robbery, states that “[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another.”

In this case, the convictions were in accordance with the evidence. With respect to the first incident, the state presented evidence that Orr and Hayes had committed robbery when they had taken property from Gill under the threat of physical harm. As for the second incident, there was evidence that Hayes had indicated possession of a firearm while he and Orr had forced Pugh to drive to the bank and withdraw money for them. To facilitate the commission of that aggravated robbery, Orr and Hayes had removed Pugh and her children from the place where they had been found and had restrained their liberty for a significant period of time. The trial court did not lose its way in finding Orr guilty, and we overrule the first, second, and third assignments of error.

In his fourth assignment of error, Orr argues that the omission of mens rea allegations in the indictment mandated the reversal of the convictions.

In *State v. Colon (Colon I)*, the Supreme Court of Ohio held that the omission of a mens rea allegation in the indictment was a structural defect that rendered the conviction improper.⁴ But in *State v. Colon (Colon II)*,⁵ the court held that the holding in *Colon I* was confined to its specific facts, noting that rarely will the absence of a mens rea allegation in the indictment permeate the proceedings to such

⁴ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶38.

⁵ 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

an extent that a conviction would be invalid.⁶ If the defect in the indictment does not permeate the proceedings and the defendant fails to object to the alleged defect, an appellate court is to review the proceedings for plain error.⁷ Under the plain-error standard, an appellate court will reverse a judgment only where the outcome clearly would have been different absent the alleged error.⁸

In this case, there was no plain error. The case was tried to the bench, and we presume that the trial court applied the proper mens rea standards to the offenses. The state did not present the offenses as strict-liability crimes, and there was ample evidence that Orr had acted purposely. Thus, we overrule the fourth assignment of error.

In his fifth assignment of error, Orr contends that the trial court imposed excessive sentences.

Under *State v. Foster*,⁹ a trial court has full discretion to impose a sentence within the statutory range. In this case, the trial court did not abuse its discretion. Orr had an atrocious criminal record, and the offenses in this case included the victimization of children. Although the trial court ordered maximum sentences for the offenses and ordered a number of the sentences to be served consecutively, the 32-year aggregate term was still far less than the maximum sentence that Orr could have received. We overrule the fifth assignment of error.

In his sixth assignment of error, Orr argues that the aggravated robbery and kidnappings were allied offenses of similar import and that the trial court therefore erred in imposing sentences for the kidnappings.

⁶ Id. at ¶8.

⁷ Id at ¶7.

⁸ *State v. Miller*, 1st Dist. No. C-070691, 2008-Ohio-5899, ¶22.

⁹ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

The commission of a robbery necessarily entails the restraint of the victim's liberty for a sufficient amount of time to complete the robbery.¹⁰ But where the restraint is prolonged, the confinement is secretive, or the movement is so substantial as to demonstrate a significance apart from the robbery, there exists a separate animus to support convictions for both offenses.¹¹

In the case at bar, the state demonstrated a separate animus for the kidnapping offenses. Orr and Hayes had forced Pugh to drive to a bank that was a substantial distance from the restaurant. They had restrained Pugh and her children while Pugh withdrew the money, and they had forced Pugh to return to the restaurant. Finally, they had ordered Pugh to drive to her home with the implicit threat that if she did not do as they commanded, they would physically harm her and the children. The state thus demonstrated substantial asportation and prolonged restraint, and the sentences for kidnapping were appropriate. We overrule the sixth assignment of error.

In his seventh and final assignment of error, Orr argues that the trial court erred in failing to rule on his pretrial motions to dismiss and his motion to suppress. When a court fails to explicitly rule on a motion, it may be presumed that the court has denied the motion if it proceeds in a manner consistent with denial.¹² Here, the trial court's proceeding with the trial and admitting the challenged evidence established that it had implicitly denied the motions. We overrule the seventh assignment of error.

Although we have overruled each of Orr's assignments of error, we have noted that the trial court failed to address the issue of court costs in its judgment entry. We

¹⁰ *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345.

¹¹ *Id.*, syllabus. See, also, *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614, ¶128, jurisdictional motion overruled, 120 Ohio St.3d 1525, 2009-Ohio-614, 901 N.E.2d 245.

¹² See *State v. Hablutzel* (Nov. 23, 1988), 1st Dist. Nos. C-870789, C-870790, and C-870791.

therefore remand the case for the court to address that issue and to make the appropriate order in its judgment entry. In all other respects, we affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., HILDEBRANDT and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 28, 2010
per order of the Court _____.
Presiding Judge